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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of: )  
)  
THE TENNIS CHANNEL, INC. )  
) MB Docket  
) No. 10-204  
v. )  
)  
COMCAST CABLE COMMUNICATIONS, ) File No.  
LLC ) CSR-8285-P  
)  
Complaint Alleging Program )  
Carriage Discrimination )

Wednesday,  
April 27, 2011  
Volume 4

Hearing Room TW-A363  
445 12th Street, S.W.  
Washington, D.C.

The above-entitled matter came on for  
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JUDGE RICHARD L. SIPPEL

Chief Administrative Law Judge

Neal R. Gross & Co., Inc.  
202-234-4433

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1 P-R-O-C-E-E-D-I-N-G-S

2 9:36 a.m.

3 JUDGE SIPPEL: The door is open.

4 Is there going to be a need to be concerned  
5 about closing the courtroom with in camera?

6 MR. CARROLL: Yes, Your Honor. I  
7 have kind of one very important thing, and I  
8 noted this -- I just wanted to get this out on  
9 the table right away.

10 JUDGE SIPPEL: I haven't reported  
11 on the baseball game yet.

12 MR. CARROLL: What was the score?

13 JUDGE SIPPEL: Well, I hadn't got  
14 to that yet. It was 6 to 4, the Nats, that  
15 being the Nationals. They got three home  
16 runs. They still haven't learned that you've  
17 got to put somebody on the base before you hit  
18 the home run.

19 (Laughter.)

20 But the Mets were a fine, young,  
21 scrappy team, and I feel very good about it.  
22 Because I said, I told my daughter, I said,

1       there is a very assertive defense counsel who  
2       we left standing in the courtroom, and I  
3       promised him a happy report. So there you go.

4               MR. CARROLL: Perfect.

5               JUDGE SIPPEL: New York won.

6       Things are good.

7               MR. CARROLL: Things are good.

8               JUDGE SIPPEL: All right.

9       Anything else?

10              MR. PHILLIPS: There are a few  
11       housekeeping matters, Your Honor.

12              JUDGE SIPPEL: Please.

13              MR. PHILLIPS: First, if I may  
14       approach, this -- you asked yesterday for the  
15       names and positions of people on the board.

16              JUDGE SIPPEL: Thank you.

17              MR. PHILLIPS: And this, I have  
18       Exhibit 209, is a little list of all the  
19       people on the board of the Tennis Channel.

20                       (Whereupon, the above-referred to  
21       document was marked as Tennis  
22       Channel Exhibit No. 209 for identification.)

1 JUDGE SIPPEL: By the way, we  
2 received your motion to strike and appreciate  
3 that.

4 MR. PHILLIPS: I have hard copies  
5 of that, if Your Honor would like.

6 JUDGE SIPPEL: I would, but we  
7 have received it, and we're much aware of it.

8 MR. PHILLIPS: Well, I have hard  
9 copies of it, Your Honor. I just have to find  
10 them. We also -- we served it last night.

11 JUDGE SIPPEL: Thank you. Thank  
12 you.

13 MR. PHILLIPS: You're welcome.

14 MR. SCHMIDT: Your Honor, there is  
15 one other housekeeping matter we wanted to  
16 raise at Your Honor's convenience.

17 JUDGE SIPPEL: Yes?

18 MR. SCHMIDT: Last night, about  
19 9:30, we received what is represented to us as  
20 another opinion from Mr. Orszag. It came  
21 along with a lot of data underlying it, so  
22 much data that it had to be sent in five

1 different emails to get through.

2           Apparently, as best we can figure  
3 out, it's not actually the complete data set,  
4 but basically, we're now in a position where  
5 the night before his testimony, he's provided  
6 us with a new substantiative report.

7           We called Dr. Singer to say, we're  
8 sending this data to you. We were very  
9 mindful of Your Honor's admonition. We said,  
10 we don't want to talk about your testimony, we  
11 just want you to have this data.

12           JUDGE SIPPEL: That was perfectly  
13 appropriate.

14           MR. SCHMIDT: Yes, as I understand  
15 it, Dr. Singer said, I can't figure this out.  
16 I think his assistant looked at it overnight  
17 and now says we're missing some of the data  
18 needed to actually run Mr. Orszag's data.

19           So we find ourselves in this  
20 position where Mr. Orszag is set to testify  
21 today, and we can't figure out what his  
22 opinions on this subject are other than it's



1 very clear he disagrees with Dr. Singer.

2 I think it relates to the last  
3 line of questioning Mr. Carroll was covering  
4 last night, and we have no way of effectively  
5 cross examining him on it, because we can't  
6 figure out the data, and we literally got it  
7 the night before.

8 And as I understand it, when  
9 someone -- one of Dr. Singer's colleagues  
10 looked at it, he couldn't figure out how to  
11 make it run, and that's the limits of my  
12 technical knowledge on this. This is what  
13 I've been told about the data.

14 I think we're in a position where  
15 we have to wait to see how it comes in, but we  
16 find ourselves in a position where we're  
17 surprised by new information coming in on the  
18 eve of testimony after we've presented Dr.  
19 Singer for his direct, so he can't respond in  
20 his direct. He can't respond in his redirect,  
21 because we can't figure out what Mr. Orszag  
22 did.

1                   So if it does end up coming in, we  
2                   wanted to let Your Honor know about this. If  
3                   it does end up coming in, we could find  
4                   ourselves in a position where we ask to recall  
5                   Mr. Orszag for further testimony on this, if  
6                   he's allowed to give an opinion on this, so we  
7                   can effectively cross examine him on this,  
8                   and/or where we have to do a rebuttal report  
9                   from Dr. Singer once we're able to figure out  
10                  what this analysis is and how it works.

11                  I just wanted to bring that to the  
12                  court's attention. I think it will ripen at  
13                  some point today, at least in terms of  
14                  whatever opinion Mr. Orszag has to offer on  
15                  this issue being presented to the court.

16                  JUDGE SIPPEL: Well, that's a  
17                  rather significant development.

18                  Can you shed some light on that,  
19                  Mr. Carroll?

20                  MR. CARROLL: Absolutely, Your  
21                  Honor. And good morning again.

22                  JUDGE SIPPEL: Good morning.

1 MR. CARROLL: I wish Counsel had  
2 told us this. This is the first time hearing  
3 of these issues. I've been here all morning  
4 with Mr. Schmidt. He could have called me  
5 last night.

6 What happened is, Mr. Singer  
7 himself came in with a new opinion --

8 JUDGE SIPPEL: Dr. Singer.

9 MR. CARROLL: Dr. Singer came in  
10 with a new opinion last week, and we didn't  
11 complain. We had trouble accessing the  
12 database as well.

13 We let our friends know, and it  
14 wasn't until Friday that we actually get -- of  
15 last week, got an answer to where the database  
16 had come from.

17 The answer was actually wrong, but  
18 we struggled our way through over the weekend,  
19 and the subject that I was examining on at the  
20 end of the day yesterday is that subject. It  
21 relates to the material that was that new to  
22 us.

1           We have an expert who now is in  
2           the same area, and he's going to rebut what  
3           Dr. Singer has offered, what Dr. Singer  
4           offered late to us, we're dealing with it, and  
5           it's only in rebuttal to what Dr. Singer's  
6           doing.

7           I think --

8           JUDGE SIPPEL: Well, it was only  
9           in rebuttal, or to address those items that  
10          you just said were delivered to you late, were  
11          late coming?

12          MR. CARROLL: Exactly right.

13          JUDGE SIPPEL: Nothing else.

14          MR. CARROLL: You follow me,  
15          there's nothing else. It's purely rebuttal to  
16          the new opinion that Dr. Singer came in with  
17          for the first time, which was so new we  
18          couldn't even depose him about it. He came in  
19          with it after the deposition.

20          Now, again, I didn't raise any of  
21          these issues to complain. I figured we'll  
22          just work our way through it.

1 I think that it's an area where --  
2 well, economists will get very focused on it.  
3 I'm not sure the extent to which the court  
4 will find it dispositive or not, but I'm all  
5 for getting all the facts out so that you can  
6 have a full record in this area.

7 And therefore, if there truly is  
8 any difficulty my friends on the other side  
9 are having in digesting the information or,  
10 you know, figuring something out with it, I  
11 have no objection in advance to if they want  
12 to put in another rebuttal report afterwards.  
13 I know Your Honor has sometimes done that in  
14 other proceedings. I think in one of the MASN  
15 cases you did that.

16 Nobody's trying to hamstring them  
17 or cut them off. But we have to be able to  
18 respond in kind to a new opinion that we  
19 received from Dr. Singer, unless that's going  
20 to be struck from the record.

21 And that's the nature of what this  
22 is. We gave them the information. We were

1       running it all weekend. I think they knew we  
2       were running it all weekend because we told  
3       them on Friday we were still having trouble  
4       opening their database, and we couldn't get  
5       the numbers to match.

6               And so I doubt there's any  
7       surprise about the fact, truthfully, that we  
8       were working on something in this area, and we  
9       finally sorted our way through it over the  
10      weekend. We gave them the information as soon  
11      as we were able to do it.

12             The volume of the database, all of  
13      the data is basically the same data. We have  
14      two economists who are running regression  
15      analysis on common information about market  
16      shares, and they're just different ways of  
17      cutting the database is all it is, so there's  
18      no new, hardcore data that's in this.

19             It's just an expert rebutting  
20      another expert's presentation on how that data  
21      should be handled.

22             JUDGE SIPPEL: Now, let me just

1 ask the question, Mr. Schmidt. Is it true?

2 I mean, do you agree with that, that it's

3 basically, it's the same data, it's just that

4 it's been rearranged in some different form?

5 Go ahead.

6 MR. SCHMIDT: I think that's

7 broadly true, broadly true, in the sense that

8 it's the same data.

9 JUDGE SIPPEL: Okay.

10 MR. SCHMIDT: And I'm about to

11 exhaust every technical piece of knowledge I

12 have in answering this question, but as I

13 understand it, what we can't figure out is

14 what manipulation -- Mr. Carroll spent a lot

15 of time with Dr. Singer yesterday going

16 through a very technical analysis of what he

17 did in this specific inquiry.

18 As I understand it, Mr. Orszag is

19 now responding to that, and we cannot do the

20 same thing because, while we know the same

21 general data, what we don't know is how Mr.

22 Orszag manipulated that data to be able to do

1 the same kind of analysis that Mr. Carroll  
2 did.

3 And that's really the nature of  
4 our concern, the history here --

5 JUDGE SIPPEL: Go ahead.

6 MR. SCHMIDT: Sorry. I apologize.  
7 The history here is that this data originally  
8 flows from the motion to compel that Your  
9 Honor granted I believe a month or so ago, so  
10 it was not available at the time of Dr.  
11 Singer's report.

12 It was included in his expert  
13 disclosure on April 13th. To be clear, there  
14 were new analyses that both sides put in their  
15 April 13th disclosure. That happened with  
16 folks on their side. Dr. Singer did that in  
17 this area.

18 The concern we have is --

19 JUDGE SIPPEL: In this area,  
20 you're patting the table. You mean, in his  
21 testimony?

22 MR. SCHMIDT: Yes, sir.



1 JUDGE SIPPEL: His written  
2 testimony? Thank you.

3 MR. SCHMIDT: Yes, sir. On the  
4 19th, my colleagues on the other side of the  
5 table came to us and said, we need the  
6 underlying data. We produced it pretty  
7 promptly.

8 As Mr. Carroll said, they came  
9 back to us on the Friday and said, asked for  
10 the data again. We said the data we have is  
11 the data we gave to you the prior Tuesday.

12 And the concern we have is simply,  
13 at 9:30 at night, getting this data, looking  
14 at it for two hours, at 11:30 at night  
15 realizing that we couldn't figure out what he  
16 did in that look, and then I guess, as I  
17 understand it, with further review overnight  
18 by Dr. Singer's assistant, realizing we're not  
19 even sure we have all the data.

20 So that's the concern we have, is  
21 it does seem to be there has to be an end to  
22 rebuttals and surrebuttals and new analyses,

1 and third analyses --

2 JUDGE SIPPEL: Yes, there will be.  
3 That's my job.

4 But let me suggest this, then.  
5 Obviously, I mean, this is the genius of  
6 discovery in depositions. You obviously need  
7 something to ferret this out, and it's either  
8 a question of -- well, we could put the  
9 witness on. What's his name again, Mr. --

10 MR. CARROLL: Orszag.

11 JUDGE SIPPEL: Pardon?

12 MR. CARROLL: Mr. Orszag.

13 JUDGE SIPPEL: Yes, Mr. Orszag.  
14 And I've seen him before. I'm sorry, I'm just  
15 -- names are slipping from me.

16 You get Mr. Orszag on, and you go  
17 through as much as you can and leave this area  
18 out. And then you'll get this transcript, and  
19 then -- well, you wouldn't -- my idea is that  
20 you wouldn't cross examine him.

21 If it could be done today or  
22 tomorrow, then, maybe by -- what is tomorrow?

1 Thursday? By Friday you could be prepared for  
2 cross examination.

3 Or if it takes a deposition and  
4 preparation over the weekend, if Mr. Carroll  
5 doesn't object to this --

6 MR. CARROLL: No objection.

7 JUDGE SIPPEL: We come back on  
8 Monday with him, so that you would be, you  
9 know, fully prepared.

10 What I don't -- want to avoid, is  
11 I want to avoid depositions in the middle of  
12 the hearing, I mean, using the witness chair  
13 here for depositions.

14 So, I'll accommodate -- I'll  
15 personally accommodate, but it's got to be  
16 careful to be dovetailed with Mr. Carroll,  
17 because -- well, for obvious reasons.

18 MR. SCHMIDT: Well, let me say,  
19 Your Honor, first of all, I appreciate very  
20 much -- we appreciate very much, Your Honor,  
21 your understanding of that, and giving us the  
22 opportunity for a fair exploration of Mr.

1 Orszag's new opinions.

2 And I appreciate Mr. Carroll  
3 agreeing to work with us, as I just understood  
4 him to say.

5 What may make sense in terms of  
6 disruption of the witness is -- I'm loathe to  
7 put us terribly out of schedule for this  
8 analysis, when I'm not sure how much it will  
9 feature in Mr. Orszag's testimony. It may  
10 make sense to put him on on everything else  
11 and return to this issue --

12 MR. CARROLL: I'm fine with that.

13 MR. SCHMIDT: -- or make an  
14 assessment of where we stand on this issue,  
15 because frankly, and it's why I appreciate  
16 Your Honor's flexibility, we're still, not, to  
17 be honest, really sure what he's going to say  
18 on this, and it may be that this is a small  
19 issue. It may be that it's a big issue. And  
20 we'll know the answer to that after he  
21 testifies.

22 And if there's kind of re-opener

1 on this one limited issue, that may be  
2 necessary, it may not be necessary. I think  
3 that would address our concerns.

4 MR. CARROLL: And Your Honor, I'm  
5 fine -- I'm more than happy to accommodate  
6 that, because I really think the bottom line  
7 should be, we just sort of get to the bottom  
8 of it with the exchange of information.

9 So if they'd like to reserve the  
10 right to recall Mr. Orszag on this issue,  
11 there's no objection from my side.

12 If they'd like the right to do  
13 some examination of Mr. Orszag over the  
14 weekend on this issue, I won't object to that  
15 either.

16 JUDGE SIPPEL: You're certainly  
17 being accommodating.

18 MR. SCHMIDT: I think that answers  
19 our question, Your Honor. I appreciate it.

20 JUDGE SIPPEL: May I just make one  
21 suggestion?

22 MR. SCHMIDT: Yes.

1 JUDGE SIPPEL: Perhaps between now  
2 and lunch time, you know, if your team can  
3 accommodate this, Mr. Carroll, maybe you could  
4 put together a short form Rule 26 proffer of  
5 what he's going to do with that information.

6 MR. CARROLL: We actually sent  
7 that over last night. We sent them a short  
8 supplemental statement of the opinions he'd be  
9 offering in the area.

10 But to be fair, I think Mr.  
11 Schmidt would say, but I haven't had a chance  
12 to explore that and get behind that, and  
13 therefore, that's why I'm not resisting this.

14 And I'm happy to work with him.  
15 If I'd known there was a data issue still  
16 remaining last night, I would have made  
17 resources available overnight.

18 I have resources sitting back in a  
19 room right now that if you get me a name on  
20 your side, I'll see if I can help them solve  
21 any issue they're having accessing the data.

22 And as I hope everyone will

1 appreciate, I'm trying to be as accommodating  
2 as possible on this issue. And I'll make Mr.  
3 Orszag available again, and I'll also make  
4 sure that they get any facilitation with the  
5 data they need here.

6 JUDGE SIPPEL: That is wonderful.  
7 I appreciate this, and I'm sure the other side  
8 does appreciate this very much, too.

9 MR. CARROLL: See, a good night's  
10 rest, and I've woken up in a good mood here,  
11 and not withstanding the baseball game --

12 JUDGE SIPPEL: Well, no, I'm  
13 telling you -- I mean, it just goes to show,  
14 you see, if Mr. Schmidt had gone to the  
15 baseball game last night, he wouldn't have  
16 known anything about that.

17 (Laughter.)

18 UNIDENTIFIED SPEAKER: That would  
19 be a better world for everyone, Your Honor.

20 JUDGE SIPPEL: There's a reason  
21 for all those places to go.

22 (Laughter.)

1 By the way, I couldn't help but  
2 think of Tennis Channel when I was sitting  
3 over there with my daughter, you know, looking  
4 around the stadium. And I mean, boy, if you  
5 all are looking for that demographic that you  
6 want, [REDACTED] with [REDACTED] plus income, it  
7 was sitting there for the taking.

8 (Laughter.)

9 Now, that's not true in the right  
10 field of the Yankee Stadium.

11 (Laughter.)

12 MR. CARROLL: No, those would be  
13 the Versus fans out there.

14 (Laughter.)

15 JUDGE SIPPEL: Yes, Versus was a  
16 little too light for them, maybe.

17 Okay. We're on base now. I'm  
18 sorry, Dr. Singer, I apologize. I meant to  
19 say good morning to you, sir.

20 THE WITNESS: Good morning. How  
21 is everything?

22 JUDGE SIPPEL: We just got -- oh,



1 fine with me. Are you all right? You're  
2 fine. I shouldn't ask it that way.

3 Okay. You still understand,  
4 you're still under oath.

5 Are you set to go forward with  
6 this cross?

7 MR. CARROLL: We're all set to go  
8 forward.

9 JUDGE SIPPEL: Okay. Let's do it,  
10 please.

11 MR. CARROLL: Thank you, Your  
12 Honor.

13 WHEREUPON,

14 HAL SINGER

15 HAVING BEEN PREVIOUSLY SWORN, WAS RECALLED AND  
16 TESTIFIED AS FOLLOWS:

17 CROSS EXAMINATION (CONTINUED)

18 BY MR. CARROLL:

19 Q I thought that I'd pick up where  
20 we left up yesterday, and let me review as a  
21 refresher here, Dr. Singer.

22 We had spoken yesterday at the end

1 of the day about how you went about averaging  
2 the market share information as part of your  
3 analysis. Do you remember that subject?

4 A Yes.

5 Q Okay. And I think, after some  
6 back and forth, you explained that what you  
7 did was you weighted the average and the  
8 weighting factor that you used, you used the  
9 headend data as effectively your weighting.  
10 Is that correct?

11 A That's effectively what happened.  
12 Of course, I didn't set about to weight  
13 headends, but that's effectively what happened  
14 as a result of my merge.

15 MR. CARROLL: Okay. And Your  
16 Honor, I thought it would be just terrific if  
17 we started with another addition to the  
18 glossary this morning. If I may --

19 JUDGE SIPPEL: Growing.

20 MR. CARROLL: May I approach, Your  
21 Honor?

22 JUDGE SIPPEL: Please do.